

RECEIVED

MAR 23 2001

DEPARTMENT OF WATER RESOURCES

Movant: State of Idaho

ALAN G. LANCE
ATTORNEY GENERAL

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

PETER J. AMPE
Deputy Attorney General
Natural Resources Division
700 W. Jefferson Street, Room 210
P. O. Box 44449
Boise, ID 83711-4449
Telephone: (208) 334-2400
Facsimile: (208) 334-2690
Idaho State Bar # 5209 (Ampe)

Attorneys for the State of Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

| | | |
|----------------|---|---|
| |) | Subcase No. 91-00005 |
| |) | |
| In Re: SRBA |) | Basin-Wide Issue 5 |
| |) | (Conjunctive Management General Provision) |
| Case No. 39576 |) | |
| |) | THIRD AFFIDAVIT OF KARL J. DREHER |
| _____ |) | |

COPY

STATE OF IDAHO)
) ss.
County of Ada)

KARL J. DREHER, being first duly sworn upon oath, deposes and says:

1. I make the following statements based on personal knowledge.
2. I am the Director of the Idaho Department of Water Resources. My professional qualifications and history are described in the *Affidavit of Karl J. Dreher*, Subcase No. 91-00005 (December 30, 1999) on file with the Snake River Basin Adjudication Court.
3. In my capacity as Director of the Idaho Department of Water Resources, I have the authority and responsibility for the administration of water rights within the State of Idaho.
4. I am familiar with the recommended general provisions at issue as part of Basin-Wide Issue No. 5, known as the conjunctive management general provisions. Further, I am familiar with the files and record in Subcase No. 91-00005 now before the SRBA District Court, including the briefs of the parties supporting or opposing the State of Idaho's pending motion for summary judgment.
5. Conjunctive administration, or conjunctive management, of surface and ground water rights from connected sources means that the distribution of water under the rights will be administered in accordance with the prior appropriation doctrine including appropriate recognition that the effects of ground water diversions on connected surface water sources may be substantially delayed in time and spatially dispersed. In order to accomplish conjunctive administration in accordance with the prior appropriation doctrine, detailed data regarding location, operation, priority, water usage and

hydrogeologic characteristics of the aquifer system are essential, not solely the priority and quantity of each diversion.

6. The recommended general provisions for the conjunctive management of interconnected surface and ground water rights cannot be construed to allow the Department of Water Resources to administer decreed water rights in any manner not in accordance with the prior appropriation doctrine, as set forth in well-established Idaho law.

7. The very purpose of conjunctive management general provisions is to allow for the administration of water rights in accordance with the respective priority dates of all water rights to use interconnected surface and ground water comprising a common source of supply. Without such general provisions, right holders for ground water may assert that ground water rights are immune from conjunctive administration based on respective priority dates because the decreed source (ground water) is not decreed to be connected to a decreed surface water source.

8. To date, rights to the use of interconnected surface and ground water have not been administered conjunctively in Idaho except in isolated instances, primarily on a case-by-case basis under the provisions of I.C. § 42-237a(g).

9. A principal objective of conjunctive administration of water rights by the Department of Water Resources will be to fully recognize the relative priority dates of the respective water rights subject to conjunctive administration. Attributing significance to the relative priority dates of interconnected surface and ground water rights, other than on a case-by-case basis, will constitute a change from past administration of water rights

from connected ground water and surface water sources in Idaho, which generally has administered surface and ground water sources separately.

10. Recognizing the relative priority dates of interconnected surface and ground water rights does not mean that the decreed quantity and priority date of a water right are the only factors to be considered in the administration of interconnected surface and ground water rights. In administering water rights under the prior appropriation doctrine, the Department of Water Resources also must consider the delayed and spatially dispersed effects of ground water diversions on connected surface water sources, as well as whether the right holder calling for delivery of water can place the water to beneficial use in accordance with the decreed elements of the water right. To do otherwise could result in the needless curtailment of thousands of junior priority water rights without increasing water available for senior water rights. This would block "full economic development of underground water resources" counter to the requirements of I.C. § 42-226.

11. Administering interconnected surface and ground water rights conjunctively means that the Department of Water Resources will recognize that the sources of water are connected in varying places and to varying degrees throughout the basin. The Department's administration will be based upon the best hydrogeologic information available at any given point in time, which is consistent with how surface water rights are currently administered. The Department will not administer the rights to the use of water from interconnected surface and ground water sources as if the connected sources are comprised solely of surface water or solely of ground water.

12. The first paragraph of the general provision submitted by the Trout Companies would appear to require the Idaho Department of Water Resources to administer water rights solely according to priority, without considering the actual effects of a junior diversion upon a senior diversion calling for delivery of water. Adopting this approach to water rights administration would require the Department to immediately curtail all junior ground water diversions and junior surface water diversions from interconnected sources as soon as the surface water flows within the system became inadequate to satisfy more senior surface water rights within the basin. Such curtailment would appear to be required regardless of whether the reduction in junior ground water diversions or junior surface water diversions results in any meaningful increase in surface water flows.

13. Such an approach to water rights administration would be inconsistent with my understanding of the principles of the prior appropriation doctrine and would also be inconsistent with the manner in which surface water rights are currently administered under the prior appropriation doctrine in Idaho. In any basin in which the surface water streams are fully appropriated, under the Trout Companies' approach there would appear to be no opportunity for the continued utilization of any ground water resources within the basin. However, under the prior appropriation doctrine a junior right holder is subject to curtailment only if curtailment would result in the availability of water for a beneficial use under a senior water right or if, absent sufficient mitigation, injury is occurring. Junior surface water rights within the Snake River Basin presently are not curtailed unless curtailment is necessary to satisfy a beneficial use of water under a senior surface water right. Thus, junior surface water rights are frequently allowed to continue diverting even

though more senior priority water rights in another portion of the basin are being curtailed. Water rights administration on the Boise River is an example of such administration.

14. Under the prior appropriation doctrine, a water right defines the maximum quantity entitlement of the right holder. However, the amount of water that may be diverted under the right at any point in time is limited to the amount necessary to achieve the beneficial use authorized under the right. An example of why this is an essential consideration in administering water rights occurs in Basin 36, where irrigation water rights have recently been partially decreed in the SRBA. Rights to use surface water in the Hagerman Valley were originally appropriated by beneficial use through flood irrigation. In more recent times, many of the right holders for irrigation in the Hagerman Valley have converted from flood irrigation to sprinkler irrigation. Because these water rights had not otherwise been changed, the Department of Water Resources, under my direction, recommended the water quantity element for these water rights be sufficient to provide for flood irrigation. The SRBA District Court decreed the quantity element of these water rights consistent with the Department's recommendation. However, it would be wholly inappropriate to now simply distribute water in priority to these rights based on the decreed amount when beneficial use is made through sprinkler irrigation and the decreed amount is not reasonably needed for sprinkler irrigation. It would only be appropriate to distribute the decreed amount in priority when for economic or other reasons, use of water by flood irrigation is necessary to achieve the beneficial use authorized under the rights and the decreed amount of water is reasonably needed. Efficient water rights administration requires that there be some oversight to ensure that

water is only diverted from the public resource as necessary to satisfy the beneficial use for which it was appropriated. This administrative oversight is the responsibility of the Director of the Department of Water Resources, and it is clearly distinguishable from the judicial function of decreeing the elements of the water right, one of which is the maximum amount of water that may be diverted.

15. In administering water rights, the Department of Water Resources cannot simply look at the quantity element of a water right as decreed. The quantity element sets the maximum limit for water distribution under the right. The Department must have the ability to determine what quantity of water is reasonably necessary for the authorized beneficial use, without undue waste, at the time when water is distributed to a particular right. Among the factors necessary to consider are the extent of beneficial use being made of the water, the need for water to satisfy that beneficial use during a particular time period, and whether a delivery call will be futile.

16. Circumstances under which the distribution of water to a decreed water right for irrigation could be precluded due to a lack of beneficial use exist where the lands to which the right is appurtenant have been placed in a federal cropland set-aside program, or the lands are furloughed as part of an electric power demand buy-down program. Although valid irrigation water rights continue to exist for the lands in such programs, distribution of water under the appurtenant water rights cannot occur if there are no authorized beneficial uses being made under the water rights, including distribution from the state's water bank.

17. The change in water rights administration that would be required under the first paragraph of the Trout Companies' proposed general provision would not serve to

define any water right in the SRBA and would inhibit the efficient administration of water rights within the Snake River Basin because the Idaho Department of Water Resources would be forced to allow the waste of water. For example, the most junior water rights presumably would be the first water rights curtailed, and these water rights presumably would be ground water rights. The locations of the points of diversion for the most junior ground water rights may be geographically the most distant and could have the least impact on the senior water right. Such an administrative approach is not required by the prior appropriation doctrine as implemented by Idaho law.

Further your Affiant sayeth naught.

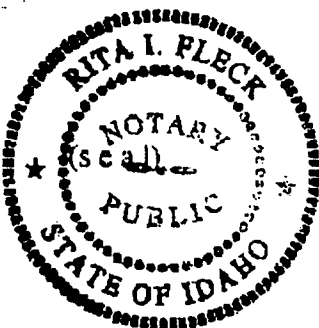
DATED this 23rd day of March, 2001.



Director

Idaho Department of Water Resources

SUBSCRIBED AND SWORN TO BEFORE ME this 23rd day of March, 2001.



NOTARY PUBLIC for Idaho

Residing at: Boise, Idaho

My Commission Expires: 1/25/2006

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March 2001, I caused to be served a true and correct copy of the foregoing **THIRD AFFIDAVIT OF KARL J. DREHER** by the method indicated:

Jerry R. Rigby
Gregory W. Moeller
RIGBY, TILATCHER, ANDRUS, RIGBY,
KAM & MOELLER, CHARTERED
25 North Second East
Rexburg, ID 83440

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 356-0768
- ☐ Statehouse Mail

Scott L. Campbell
Angela D. Schaeer
T. Guy Hallam
ELAM & BURKE, P.A.
702 West Idaho, 10th Floor
Boise, ID 83701

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

Daniel V. Steenson
Charles L. Honsinger
RINGERT CLARK CHARTERED
455 S. Third St.
Boise, ID 83701

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

Jason Miciak
JASON MICIAK P.C.
392 Falls Ave.
Twin Falls, ID 83303-2632

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

Albert P. Barker
Timothy J. Callanan
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
Boise, ID 83701

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

Court Certificate of Mailing for Basin-Wide 5
Conjunctive Management

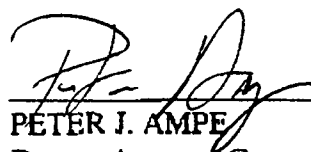
- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☒ Statehouse Mail



PETER J. AMPE
Deputy Attorney General
P1079nac.doc